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Nos. 84-328, 84-5163, 84-5219, and 84-5319

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In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE WASHINGTON COOPER, III, AND JERRY HERBERT JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

FERROL "BUD" McKINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCES LOCKAMY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether transportation of unauthorized reproductions of copyrighted sound recordings may form the basis for a charge of interstate transportation of stolen property in violation of 18 U.S.C. 2314.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B11)[1] is reported at 733 F.2d 1503.

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[1]"Pet. App." refers to the appendix to the petition in No. 84-328, unless otherwise indicated.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1984. A petition for rehearing was denied on July 18, 1984 (84-5163 Pet. App. 9). The petition for a writ of certiorari in No. 84-328 was filed on August 31, 1984; the petition in No. 84-5163 was filed on July 31, 1984; the petition in No. 84-5219 was filed on August 13, 1984; and the petition in No. 84-5319 was filed on August 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners and others were convicted on various counts of conspiracy to conduct an enterprise involving illicit reproduction of eight-track and cassette tapes through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1); a substantive RICO offense, in violation of 18 U.S.C. 1962(c) (Count 2); interstate transportation of the pirated tapes, in violation of 18 U.S.C. 2314 (Counts 3-9); wire fraud, in violation of 18 U.S.C. 1343 (Counts 13-36, 38, 40-44); conspiracy to violate the copyright laws, in violation of 18 U.S.C. 371 (Count 50); and criminal infringement of the copyright in sound recordings, in violation of 17 U.S.C. 106(3) and 506(a) (Counts 51-54, 65). See Pet. App. B2.[2] Petitioner Cooper was sentenced to nine-years' imprisonment; petitioner Jones was sentenced to ten years' imprisonment; petitioner McCulloch was sentenced to five years' imprisonment; petitioner McKinney was sentenced to eight years' imprisonment; and petitioner Lockamy was sentenced to five years' imprisonment, suspended in favor of six months' imprisonment and a four-and-one-half-year term of probation.

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[2]Petitioners' co-defendants, Curtis R. Snipes and Larry Darrell Drum, were also convicted on various counts. See Pet. App. B2 n.1.

1. The evidence at trial showed that from 1974 through 1979 petitioners were involved in the manufacture and distribution of "pirated" eight-track and cassette tapes.[3] Petitioners conducted these operations in several states, including Florida, North Carolina, South Carolina, Kentucky, and Maine. By early 1979, petitioners and their co-conspirators had established three major interrelated and interdependent manufacturing operations, each of which bought and sold tapes and supplies from the others, shared information concerning law enforcement, and had common customers. During the time of the conspiracy, the entire enterprise manufactured, duplicated, and distributed over five million pirated tapes per year.

Petitioners Jones and McKinney worked together manufacturing pirated eight-track tapes. Jones duplicated the tapes and McKinney wound them, while co-conspirator Turner helped locate customers.[4] Petitioner Lockamy assisted McKinney in processing orders for the pirated tapes. Petitioner McCulloch helped Jones pick up and deliver orders and raw materials. Petitioner Cooper sold pirated tapes to Turner and provided Jones with background labels for pirated tapes; in addition, he purchased a duplicator from McKinney and paid for it with $18,000 worth of pirated tapes. Tr. 1459-1469, 1477-1478, 1483-1489, 1491-1495, 1534-1535, 1545-1549, 1567-1569.[5]

From October 1977 through June 1979, the FBI conducted an investigation of petitioners' enterprise through use of an undercover warehouse at which agents videotaped

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[3]"Pirated" tapes are tapes made through unauthorized reproduction of copyrighted sound recordings. See Pet. App. B2 n.2.

[4]Turner testified for the government at trial.

[5]"Tr." refers to the portion of the trial transcript found in volume 29 of the record in the court of appeals.

petitioners' conversations and the delivery and sale of pirated tapes. In addition, agents recorded conversations from the telephones of co-conspirator Turner for a period during the spring of 1979. The FBI eventually executed search warrants for the homes or business premises of several of the conspirators, including petitioners Cooper and Jones. FBI agents recovered large quantities of pirated tapes and related supplies and equipment in the course of those searches.

2. Petitioners and their co-defendants moved to dismiss the indictment on the ground, inter alia, that transportation of tapes produced through copyright infringing activities may not constitute a violation of 18 U.S.C. 2314. The district court denied the motion to dismiss (Pet. App. A1-A2).[6]

3. The court of appeals affirmed the convictions of all petitioners. The court rejected petitioners' claim that their convictions under 18 U.S.C. 2314 must be reversed because the pirated tapes had been copied from legitimately acquired phonorecords and thus did not constitute "stolen" property within the meaning of the statute.[7] The court of appeals

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[6]Petitioner Jones also filed motions to suppress evidence from intercepted conversations on the ground, inter alia, that in authorizing interception of the conversations the district court had relied on allegations that violations of 18 U.S.C. 2314 involving copyright infringing activities were occurring. The district court denied the motions to suppress (Pet. App. A3; see also 84-5163 Pet. App. 23).

[7]Petitioners also claimed that their RICO convictions were invalid because, if the Section 2314 convictions were reversed, there would no longer be sufficient predicate acts on which to ground the RICO convictions. In addition, petitioners challenged the wire fraud counts on the ground that the wiretap application was premised on investigation of the Section 2314 charges. Because the court of appeals concluded that the Section 2314 convictions were valid, it found these additional claims to be without merit. See Pet. App. B5-B6.

The court of appeals also rejected petitioner McKinney's claim that the copyright owners' cooperation with the FBI investigation absolved him of any responsibility, as well as his claim that there was insufficient

noted that it had held already in *United States* v. *Gottesman*, 724 F.2d 1517, 1520 (11th Cir. 1984), "that the intangible idea protected by a copyright is effectively made material by its embodiment upon tape and therefore constitutes 'goods, wares, or merchandise' that may be 'stolen, converted or taken by fraud' " (Pet. App. B4). The court concluded that, whether the copyrighted works were originally acquired from legitimate sources or first stolen and then reproduced, the unauthorized reproduction of copyrighted material constituted the conversion of the copyright owner's property and thus clearly fell within the terms of the statute. The court rejected the conclusion of the Fifth Circuit in *United States* v. *Smith*, 686 F.2d 234 (1982), that reproduction and distribution of copyrighted works that had been obtained through "off-the-air" taping does not fall within the ambit of Section 2314. The court in this case stated that "legitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of that material" (Pet. App. B5).

ARGUMENT

Petitioners' sole contention is that transportation of unauthorized reproductions of copyrighted sound recordings may not form the basis for a charge of interstate transportation of stolen property in violation of 18 U.S.C. 2314.[8] Petitioners urge that review is warranted because the

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evidence to negate his "first sale" defense (Pet. App. B6-B7). In addition, the court rejected co-defendant Drum's claims that his trial was improperly joined with that of the other co-conspirators and that the prosecutor had made improper remarks during his closing argument (*id.* at B8-B11).

[8]18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *

decision below and several other recent decisions conflict with the decision of the Fifth Circuit in *United States* v. *Smith*, 686 F.2d 234 (1982).[9] However, this Court has denied several petitions for a writ of certiorari that have presented similar claims. See *Hampshire* v. *United States*, No. 83-1445 (May 29, 1984); *Belmont* v. *United States*, No. 83-769 (Feb. 21, 1984); *Gottesman* v. *United States*, 460 U.S. 1014 (1983). This case does not present any new reason that would call for a different result.[10]

Despite petitioners' allegations of a direct conflict between the decision below and the Fifth Circuit's decision in *Smith*,[11] we believe review of the question presented would

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* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

[9]We note that since petitioner Cooper was not convicted on any of the Section 2314 counts, he has no standing to raise this contention. We note also that petitioner Lockamy's sentence on the single Section 2314 count on which she was convicted runs concurrently with her sentences on other counts. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

[10]We refer the Court to our briefs in opposition in *Hampshire*, *Belmont*, and *Gottesman* for discussions of why review of this issue is not warranted. We are providing petitioners' counsel with copies of those briefs.

[11]The factual situations in *Smith* and the decision below are somewhat different. In *Smith* the defendant had videotaped television programs "off the air" (*i.e.*, directly from broadcast signals) and had produced and leased multiple copies of the videotaped material. Petitioners in this case apparently purchased generally available phonorecords and tapes and produced and sold unauthorized copies of the records and tapes. See Pet. App. B4. While the material reproduced was acquired from legitimate sources in both cases, only in this case did a defendant originally record copyrighted material directly from tangible items. In contrast to both *Smith* and this case, the evidence presented in the *Hampshire*, *Belmont*, and *Gottesman* cases appeared to indicate

not be warranted. The Fifth Circuit stands alone in its conclusion that transportation of copyright infringing materials does not fall within the scope of Section 2314. Prior to the decision in this case, both the Ninth Circuit and the court below expressly rejected the conclusion reached in *Smith*. See *United States* v. *Dowling*, 739 F.2d 1445, 1450-1451 (9th Cir. 1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1519-1521 (11th Cir. 1984), citing *United States* v. *Gottesman*, 685 F.2d 1387 (11th Cir. 1982) (Table), cert. denied, 460 U.S. 1014 (1983); *United States* v. *Belmont*, 715 F.2d 459, 461-462 (9th Cir. 1983), cert. denied, No. 83-769 (Feb. 21, 1984) and No. 83-1445 (May 29, 1984). And prior to the decision in *Smith* other courts had concluded that transportation of copyright infringing materials could form the basis for charging a violation of Section 2314. See *United States* v. *Berkwitt*, 619 F.2d 649, 656-658 (7th Cir. 1980); *United States* v. *Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978); *United States* v. *Atherton*, 561 F.2d 747, 752 (9th Cir. 1977); *United States* v. *Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385-391 (E.D. N.Y. 1981). Earlier decisions involving trade secret information and maps likewise rejected formalistic distinctions between tangible and intangible property for purposes of Section 2314. See, *e.g.*, *United States* v. *Greenwald*, 479 F.2d 320 (6th Cir.), cert. denied, 414 U.S. 854 (1973); *United States* v. *Bottone*, 365 F.2d 389, 393-394 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *United States* v. *Seagraves*, 265 F.2d 876, 880 (3d Cir. 1959).[12]

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that in each of those cases there had been an unlawful initial taking of the master tape from which the pirated copies were made.

There is at least some suggestion in *Smith* that the holding in that case was confined to situations involving taping of copyrighted works "off the air." See 686 F.2d at 243-244 n.17. There was no such "off the air" taping in this case.

[12]The court in *Smith* departed from this established line of authority supporting a flexible, common sense understanding of the concept of property under Section 2314 and relied instead on rigid, and in some

Moreover, any conflict between *Smith* and the decision below concerning the application of Section 2314 to conduct that involves copyright infringing activities is of considerably diminished significance since passage of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.* (codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319). The new statute provides for felony treatment for most serious cases of copyright infringement involving sound recordings and audiovisual materials and trafficking in counterfeit labels, while prior law provided only for misdemeanor treatment for first offenses under the copyright statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke 18 U.S.C. 2314 in connection with copyright infringing activity.

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cases archaic, dictionary definitions of the statutory terms. See 686 F.2d at 239-242. The *Smith* court also placed considerable weight on its conclusion that the Copyright Act of 1976, 17 U.S.C. 506(a), and the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.* (codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319), demonstrated Congress's intent that the copyright laws should be the sole source of penalties for activities involving copyright infringement. See 686 F.2d at 246-249. In fact, nothing in the legislative history of the Copyright Act of 1976 indicates that Congress intended 17 U.S.C. 506(a) to displace 18 U.S.C. 2314 to the extent the latter statute otherwise reached activities that involved copyright infringement, and a provision of the 1982 amendments, 18 U.S.C. 2319(a), makes clear that penalties under the copyright statutes are not exclusive:

> Whoever violates [17 U.S.C. 506(a)] shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law.

See *United States* v. *Gottesman*, 724 F.2d at 1520-1521.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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